Minors and the Physician

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IT IS WELL RECOGNIZED in California that a valid and lawful consent is necessary before medical or surgical care may be given. Accordingly, before he can render such services, a physician must obtain the consent of an individual who is both legally and mentally competent to grant it.

Society has recognized as public policy that children are impulsive, impetuous and generally not capable of making valid decisions. The law recognizes this public policy and places certain protections and disabilities upon minors which prevent them from taking any action which would prejudice them in later life, and also prevent other persons from taking advantage of them. A minor's inability to give legal consent to the furnishing of medical services, unless there is some specific statutory or other legal authority to the contrary, is well recognized.

This article discusses the legal problems involved when a physician contemplates rendering medical treatment to a minor. California law defines a person of majority as any person over the age of 21 and any married person over age 18. A divorce or annulment does not change the majority status of any person. Hence a married person over 18 who later obtains a divorce or annulment, even though before reaching his twenty-first birthday, is still of the age of majority.

A minor, then, is anyone under age 18, and anyone under age 21 who has not legally married after his eighteenth birthday. From the above, it can be said that anyone of sound mental capacity over age 21, or anyone married and over 18 is not a minor and can give valid legal consent to the acceptance of medical treatment.

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Submitted October 5, 1970.

Reprint requests to: California Medical Association, 693 Sutter Street, San Francisco, Ca. 94102 (Mr. J. E. Curley, Jr.).

California law has recognized that there are many instances in which it may be not only impractical but unwise to seek the consent of the parents or legal guardian of a minor before rendering medical services. Accordingly, numerous exceptions to the general doctrine that minors cannot consent to medical treatment have evolved.

The first and most obvious of these exceptions is the situation in which immediate medical treatment is necessary to protect the health and safety of the minor in an emergency and the physician is unable to obtain valid consent from the parent or guardian in time. As a general rule in emergencies, a physician can render emergency medical treatment to any person, without the consent of the person himself or his parents or guardian, when the person is unconscious and the consent of the parents or guardian is not readily available.

The law has also recognized that as a child or minor nears the age of majority, his ability to make a valid and sound decision increases. With this in view, California has recognized a few well-defined instances in which a minor is capable of granting a valid or legal consent to the furnishing of hospital, medical or surgical care.

The first such exception was enacted in 1953. It allows an unmarried pregnant minor to give a valid and legal consent to medical treatment related to her pregnancy. Any medical treatment rendered under this exception must be related to the patient's pregnancy. This enactment further provides that the consent of the parents is not necessary for the furnishing of such care, when related to the patient's pregnancy.

This statute is ambiguous as to whether or

not the minor has the ability or capacity to grant valid and legal consent to an examination to determine pregnancy, irrespective of the results of the examination, but most probably it would be interpreted to permit her to do so. However, if it is determined that she is not pregnant, no further treatment may be rendered without parental consent. The ability of a minor to consent to an abortion, therapeutic or non-therapeutic, is discussed below.

In 1961 a law was enacted which enabled a married minor under age 18 to give valid consent for hospital or medical care. The law provides that an annulment or divorce will not terminate the married minor's ability to consent to medical treatment.

Also in 1961, a second law was enacted enabling a minor on active duty in the armed services to grant valid consent for hospital or medical care. Once a minor is no longer on active duty, however, his ability to consent terminates.

In 1965 the California Legislature enacted a statute which provides that a parent or guardian having the legal custody of a minor may authorize in writing another adult person into whose custody the minor has been entrusted to consent to any x-ray, anesthetic, medical diagnosis or treatment and hospital care which is to be rendered to the minor under the general or special supervision and upon the advice of a physician licensed in the state. Written consent from the parents or guardian in such circumstances should either state the period of time the consent will remain valid or set forth a method of terminating the consent, such as by written notice to be mailed to a specified address.

In 1968 several statutes were enacted by the California Legislature concerning the treatment of minors. One of the statutes enables any minor who has reached the age of 18 years to consent to the donation of his blood and the penetration of tissue which is necessary to accomplish such donation. The consent of the parents for that purpose is not necessary.

Another of the 1968 statutes pertains to minors who may be practically, if not economically, emancipated from their parents or guardian. This statute provides that a minor over the age of fifteen years, who is living separate or apart from his parents or legal guardian and who is managing his own financial affairs (regardless of the source of income) is capable of granting a legal consent to the rendition of medical services. It further provides that confirming consent of the parents or legal guardian is not necessary. This statute also authorizes the physician or dentist rendering the medical services in such circumstances to tell the parents or legal guardian of the treatment whether or not the minor patient approves the disclosure. A further provision is that the parents or parent of a minor who receives medical treatment from a physician under the authority of this statute is not responsible for the cost or fees of the medical treatment rendered. A physician rendering treatment upon the consent of an emancipated minor must look solely to the minor patient for his pay.

Questions often arise as to whether or not a minor who is enrolled in college and residing away from home at college is emancipated and capable of giving legal and valid consent. This question has not been decided by any court, nor is it covered precisely by statute. However, it would appear that, for the period of time that an under-age college student is residing away from the home of his parents and managing his own affairs, he would be considered "emancipated" for this purpose but on returning home would no longer have the legal ability to consent.

Provision for the consent of a minor to rendition of medical services for the treatment of any infectious, contagious or communicable disease is contained in another of the 1968 statutes. This provision will be discussed below.

In any situation where a minor can consent to medical services without the consent of a parent or legal guardian, a true physician-patient relationship is established. Accordingly, when a minor has the ability to consent to medical services, he is also entitled to the physician-patient privilege and no information concerning such medical services should be released without his consent. This physician-patient privilege applies unless there is a specific provision to the contrary provided within the law. The only exception presently provided by California law where a physician can breach the physician-patient privilege and inform a parent without the consent of the minor, is when the patient receives treatment as a minor who is both emancipated from his parents and over 15 years of age.

When a minor does not fall within one of the above exceptions, the consent of at least one

Legal Consent Requirements for Medical Treatment of Minors in Various Circumstances

If Patient Is	*Is Parental Consent Required?*	*Are Parents Responsible For Cost?*	*Is Minor's Consent Required?*	*May M.D. Inform Parents of Treatment?*
Under 21, unmarried, no special circumstances	Yes	Yes	No	Yes
Under 21, married or previously married	No	No	Yes	No
Under 21, emergency and parents not available	No	Yes	Yes (if available)	Yes
Emancipated (over 15, not living at home, manages own financial affairs)	No	No	Yes	Yes
Unmarried, pregnant, under 21, (care related to pregnancy)	No	No	Yes	No
Unmarried, pregnant, under 21, (care *not* related to pregnancy and no other special circumstances)	Yes	Yes	No	Yes
Unmarried, under 21, determination if pregnant, no other special circumstances	Probably not	Probably not	Probably yes	Probably not
Under 21, on active duty with Armed Services	No	No	Yes	No
Under 21, therapeutic abortion:				
Married or previously married	No	No	Yes	No
Emancipated	No	No	Yes	Yes
Not married or previously married or emancipated (See Addendum on page 54 of this article)	?	?	?	?
Under 21, over 12, care for contagious reportable disease	No	No	Yes	No
Birth control, under 21:				
Married or previously married	No	No	Yes	No
Emancipated	No	No	Yes	No
Care related to treatment of pregnancy	No	No	Yes	No
Not married or previously married, not emancipated, care not related to treatment of pregnancy	Yes	Yes	No	Yes

NOTE: This table was prepared in October, 1970, by Howard Hassard, Esq., and John I. Jefsen, Esq., of the firm of Hassard, Bonnington, Rogers and Huber, legal counsel to the California Medical Association.

parent is required before a physician can render medical care or services to the minor. There are no recorded California cases which have determined whether the consent of one parent is sufficient or both must assent, but it would be prudent for a physician to obtain the consent of both parents if possible. In the event one parent consents to the treatment and the other objects, it would be advisable for the physician to insist that the dispute between the parents be resolved by a court before proceeding with the treatment.

Abortions

California law requires that abortions, in patients of any age, may be performed only in hospitals accredited by the Joint Commission on Accreditation of Hospitals, and only after approval by the hospital committee on abortions. Furthermore it may be done only if the pregnancy resulted from rape or incest or the continuance of pregnancy would gravely impair the physical or mental health of the mother. There are further restrictions concerning abortions with respect to how long pregnancy has existed.

From the previous general discussion concerning the ability of minors to consent to medical treatment, it is plain that a pregnant minor can give a legal and binding consent to an abortion if: (1) she is or has been previously married; or (2) is emancipated from her parents or guardian as previously defined. Not so clear is the status of the unwed pregnant minor who is not emancipated. The California law does provide that an unmarried, pregnant minor may give consent to the furnishing of hospital, medical and surgical care related to her pregnancy, but whether "surgical care," as used in the law, would include abortion is unfortunately a question that cannot be answered with certainty. No court has yet construed the meaning of "surgical care" in these circumstances, although from the language of the law it appears that the most likely ruling should the question come to trial would be that the statute authorizing unmarried, pregnant minors to consent to medical care and treatment related to the pregnancy includes consent to therapeutic abortions. (See Addendum on page 54 of this article.)

In summary, an emancipated, married or previously married pregnant minor can grant a valid consent to an abortion. The non-emancipated, unmarried pregnant minor probably can consent to a therapeutic abortion, but this has not yet been tested in the courts.

Infectious, Contagious and Communicable Diseases

California law before 1968 was ambiguous with regard to the ability of a minor to consent to medical care and treatment for an infectious, contagious or communicable disease. Because of the ambiguity, a physician who was approached by a minor with a disease of that description was placed in an awkward position: Legally, he could not treat the patient without parental consent, but if he sought such consent he faced the medically serious probability that the minor patient would not seek further treatment. Moreover, other minors, learning that parental consent was necessary, might be deterred from seeking badly needed treatment. In addition, the California health laws require a physician to report to the State authorities any suspected cases of infectious, contagious or communicable diseases.

In 1968 California enacted a statute which authorizes a minor 12 years of age or older to give consent to the furnishing of hospital, medical or surgical care related to the diagnosis or treatment of a contagious or communicable disease which is required by law to be reported to the local health officer. The consent of the parents or legal guardian in such circumstances is not necessary. In addition, the law provides that the parents shall not be responsible for the cost of such medical treatment.

It is apparent that this law grants minors 12 years or older the right to consent to treatment related to reportable infectious, contagious or communicable diseases. It should be noted that the statute does not provide for an exception to the physician-patient relationship. Accordingly, a physician *cannot* report his treatment of the minor to the parents or guardian of the minor without the minor's consent. However, the rule that the physician *must report* the case to the local health officer is in full effect.

Birth Control

The legal definition of the practice of medicine includes the implementation of any system or mode of treating the sick or afflicted, or any

diagnosis, treatment or operation for, or prescription for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other mental or physical condition of any person. The definition of the practice of medicine would probably include professional counseling by a physician on birth control methods and the prescribing or supplying of contraceptive devices or drugs.

Before a physician can undertake to counsel anyone with respect to birth control methods, or prescribe any oral or mechanical means of contraception, he must have a valid and legal consent to do so. Hence he cannot prescribe birth control pills or any other means of contraception to a minor, or advise a minor concerning means of contraception, without having obtained a valid, legal consent. Unless one of the exceptions previously explained is applicable, such consent must come from the parents or guardian of the minor seeking such advice. In other words a physician cannot prescribe or advise a minor upon the various methods of birth control unless (1) the minor is capable of giving legal consent to medical treatment by reason of emancipation or marriage, or (2) the treatment concerning birth control is related to the treatment of a pregnancy. The physician who ignores valid consent as a prerequisite to medical treatment only exposes himself to potential liability.

Sterilization

Sterilization now can be performed legally for either therapeutic or non-therapeutic purposes in California. Until 1969 there was question as to whether or not the law in this state permitted sterilization for other than therapeutic purposes. This uncertainty was resolved by California's Court of Appeals in the case of *Jessin vs. County of Shasta.* The *Jessin* decision (first appellate ruling in the United States on the specific question of the legality of non-therapeutic sterilization) establishes that such procedures can be performed for non-therapeutic reasons, subject to usual requisites of informed consent.

Informed patient consent to sterilization whether or not for therapeutic purpose, is a legal requirement. If it is to be done therapeutically—that is, for the preservation of the health, welfare and life of the patient, rather than as an elective procedure—consent obtained in accordance with the statutes and laws previously discussed is sufficient. However, sterilization for non-therapeutic purposes or solely for the purpose of contraception involves unique consideration. Generally, a vasectomy or salpingectomy terminates the ability of a patient to sire or bear children. The ability to reverse such procedures is, at the most, questionable. Accordingly, it is readily apparent that the decision to undergo sterilization is one which will probably have lasting and dramatic effects upon the future life and well-being of the person who elects to have the procedure.

It has already been mentioned in this article that California, as public policy, has recognized that children or immature persons are impulsive, impetuous and generally not capable of making valid decisions. Also discussed have been the specific circumstances in which a minor's *inability* to consent to medical treatment is removed. Notwithstanding that such circumstances may also be applicable to a situation where a minor is seeking a sterilization procedure for non-therapeutic purposes, it would be ill advised for a physician to perform such a procedure. Because of the unique consequences of sterilization, a physician cannot safely perform a vasectomy or salpingectomy upon a minor, even though he has the consent of the patient and the patient's parents, without a court order authorizing the procedure.

Sterilization procedures also involve the rights of the spouse of the patient, but there is no specific law in California requiring the consent of the spouse to a sterilization procedure, nor has the question of whether or not a spouse's consent is necessary been precisely determined within the California jurisdiction. Hence it appears that the necessity for a spouse's consent to a non-therapeutic sterilization procedure will have to be determined by the standards of medical practice, since there is no independent legal requirement for such consent.

For convenience and quick reference, the accompanying table lists various situations relating to care of minors and the pertinent consent requirements, responsibility for fees, disclosure and the like that apply in these situations.

ADDENDUM

On October 21, 1970, after this article had been written, the California Court of Appeal (Los Angeles), in *Ballard, et. al. vs. Anderson, et. al.*, held that an unmarried, unemancipated

minor *cannot* lawfully consent to a therapeutic abortion. In August, 1970, a pregnant minor sought an order from the court declaring that under the authority of California Civil Code, Section 34.5 (which authorizes a pregnant minor to consent to medical treatment related to her pregnancy), she had the legal ability to grant a lawful consent to a therapeutic abortion. The court, by a two-to-one decision, held otherwise. She can appeal the decision to the California Supreme Court. However, from the facts it is clear that petitioner will have passed her twentieth week of pregnancy by the time the Supreme Court could act. Accordingly, the precise question at issue in *Ballard vs. Anderson,* will be moot before the Supreme Court can act, and it can, if it desires, refuse to consider an appeal from the lower court's decision on this ground alone. At this time, one must assume that a pregnant *unmarried* minor—who is *not* emancipated—cannot consent to an abortion.

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